

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of

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Federal Communications Commission
Office of Secretary

Amendment of Section 73.202(b))
Table of Allotments) MB Docket No. 03-219
FM Broadcast Stations) RM - 10797
(Statesville and Clemmons, North Carolina,) RM - 11094
and Iron Gate, Virginia))

To: Office of the Secretary
Attn: Assistant Chief, Audio Division
Media Bureau

REPLY COMMENTS

Mercury Broadcasting Company, Inc. ("Mercury"), licensee of WFMX(FM), Statesville, North Carolina, by its counsel, hereby submits its *Reply Comments* to the *Counterproposal* filed by Dick Broadcasting Company of Tennessee ("DBC") on December 1, 2003 in the above-captioned proceeding. See *Public Notice*, Report No. 2674 (released October 5, 2004). Mercury previously submitted reply comments to DBC's *Counterproposal* on December 16, 2003 (the "Reply Comments"). Mercury's *Petition* proposed to delete Channel 289C from Statesville, North Carolina, and allot Channel 289C1 to Clemmons, North Carolina as that community's first local service. In its *Counterproposal*, DBC questioned Mercury's *Tuck* showing and proposed instead that Channel 289A be allotted to Iron Gate, Virginia. However, as demonstrated in the Reply Comments, DBC's *Counterproposal* is substantively and procedurally defective and should be dismissed. In support hereof, Mercury states as follows:

1. As discussed in Mercury's Reply Comments, DBC's *Counterproposal* is procedurally defective. DBC is essentially proposing an involuntary downgrade of WFMX, and

Mercury will not consent to such a downgrade. It is axiomatic that the FCC cannot order the

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downgrade of a radio station without the licensee's consent. *See Flora and Kings, Mississippi*, 7 FCC Rcd 5477 (1992); *see e.g., Arlington, Oregon, et. al.*, 19 FCC Rcd 12803, ¶ 20 (2004) (Commission did not require a licensee to involuntarily relocate its transmitter site or install a directional antenna), *application for review pending*. This lack of consent renders DBC's counterproposal defective because the allotment of Channel 289A at Iron Gate cannot be made if WFMX remains a Class C at its current site whether or not it changes city of license.

3. Even assuming DBC's *Counterproposal* was procedurally acceptable, it should be dismissed because it would not further the public interest. DBC's proposal to downgrade WFMX at its current site would result in a huge loss in radio service for the station – 752,632 people would lose service from WFMX under the DBC proposal. Even when its Iron Gate proposal is taken into account, 558,976 people would lose radio service. As detailed in Mercury's Reply Comments, these losses can be completely avoided through the substitution of any one of three alternate channels at Iron Gate. Therefore, any bona-fide interest in a channel at Iron Gate can be satisfied without affecting Mercury's *Petition* in any way.

4. On a comparative basis, DBC's *Counterproposal* should be denied in favor of Mercury's *Petition* because a first local service at Clemmons (2000 U.S. Census population 13,827) is preferred over a first local service at the smaller community of Iron Gate (2000 U.S. Census population 404) under Priority 3. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982); *see e.g., Ardmore, Alabama, et. al.*, 17 FCC Rcd 16332, 16334-35 (2002); *Three Oaks and Bridgman, Michigan*, 5 FCC Rcd 1004, 1004 (1990).

CONCLUSION

For the foregoing reasons, the Commission should grant Mercury's original Petition for Rule Making because it is in the public interest as Clemmons, North Carolina will receive its first local service and 401,070 people will receive a new radio service. DBC's *Counterproposal* (i) is substantively defective because it does not provide as much public interest benefit, and (ii) is procedurally defective without Mercury's consent to downgrade Station WFMX.

Respectfully submitted,

MERCURY BROADCASTING
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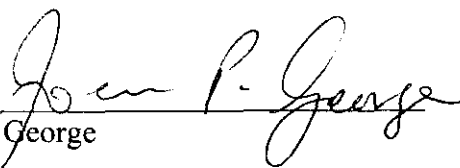
Its Counsel
October 20, 2004

CERTIFICATE OF SERVICE

I, Joan George, hereby certify that on this 20th day of October, 2004, a copy of the foregoing "**Reply Comments**" was sent via first-class mail, postage prepaid, to the following:

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